Study K-401 April 25, 1997

Memorandum 97-33

AB 939: Mediation Confidentiality

On April 16, 1997, the Commission's bill on mediation confidentiality (AB 939) (Exhibit pp. 1-16) was passed by the Assembly Judiciary Committee on the consent calendar. The bill is a bipartisan measure, authored by Assembly Member Ortiz and co-authored by Assembly Member Ackerman. Numerous organizations and groups, such as the Judicial Council, the ADR Section of the Los Angeles County Bar Association, and Community Board Program, support the bill. Nonetheless, a number of issues have arisen that warrant the Commission's attention.

PROPOSED SECTION 1115 (DEFINITIONS)

CAOC's concern

Consumer Attorneys of California ("CAOC") opposes the definition of "mediation" in Section 1115. CAOC explains that there "is one absolutely crucial item missing from this general definition: except for statutorily authorized court ordered mediations..., *voluntary participation* is essential to mediation." (Exhibit p. 17 (emphasis in original).) CAOC proposes (Exhibit p. 18) to amend the definition as follows:

> 1115. For purposes of this chapter:
> (a) "Mediation" means a statutorily authorized mediation process or the voluntary submission by parties to a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

If that amendment were made, however, Section 1115 might (but need not necessarily) be construed to mean that a mediation pursuant to an agreement, such as a contract in which the parties agree to mediation under specified circumstances but one party repudiates that term, would not be within the definition and thus would not be confidential. The amendment might also

deprive parties of confidentiality protections where a court orders parties to mediation but lacks statutory authority.

CAOC's concern about contractual mediation clauses in form contracts between parties of unequal bargaining strength is understandable. In drafting AB 939, however, the Commission did not endorse the enforceability of such contractual clauses. It just sought to ensure that if mediation pursuant to an agreement occurred, the mediation participants would be covered by the confidentiality protections of the Evidence Code.

Similarly, CAOC has expressed concern about parties being ordered into mediation without clear statutory authority. But the Commission's bill is not intended to expand judicial authority to compel mediation. Rather, the bill would afford parties the benefits of confidentiality if a court does require them to mediate.

To make these points more clear, the staff asked CAOC to consider the possibility of adding a new subdivision to Section 1115 stating:

> (b) Nothing in this chapter expands a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

This amendment would seem to address CAOC's concern about contractual clauses, while still ensuring that if mediation pursuant to contract occurs, the mediation is confidential. The amendment would also make clear that AB 939 does not expand a court's authority to order parties to mediation, but does give parties confidentiality protections where a court orders mediation but lacks proper statutory authority. CAOC has not yet expressed its position on this potential amendment.

The staff has also asked CAOC to consider whether its concern could be resolved by replacing the Commission's proposed definition of "mediation" with the definition in Code of Civil Procedure Section 1775.1, which applies to the Los Angeles pilot project on court-ordered mediation of small civil disputes. That provision defines "mediation" as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." CAOC supported this definition when the bill establishing the pilot project was under consideration, so it might be acceptable

to CAOC in the Commission's bill as well, particularly if Section 1115 also includes the proposed new subdivision.

If both of those changes were made, Section 1115 would read:

> 1115. (a) For purposes of this chapter:
>
> ~~(a)~~ (1) "Mediation" means a process in which a neutral person ~~facilitates communication between~~ or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement ~~compromising, settling, or resolving a dispute in whole or in part~~.
>
> ~~(b)~~ (2) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.
>
> ~~(c)~~ (3) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.
>
> (b) Nothing in this chapter expands a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

The Commission should consider whether this is the best means of preserving the Commission's intent while addressing CAOC's concern. The staff will supplement this memorandum if it obtains any further information on CAOC's position before the Commission meets.

CDRC and SCMA comments on reconvening a mediation

While supporting the Commission's bill in principle, California Dispute Resolution Council ("CDRC") comments that AB 939 "is not clear what the parties to the mediation which has been terminated need to do to reinitiate mediation if they think it would be helpful." (Exhibit p. 20.) Southern California Mediation Association ("SCMA") expresses similar concern about protecting the confidentiality of efforts to reconvene a mediation. (Exhibit p. 21.) Amending Section 1115's definition of "mediation consultation" to explicitly include communications for the purpose of reconvening a mediation may resolve those concerns:

> 1115. For purposes of this chapter:
>
> ….
>
> (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of ~~initiating or considering~~

initiating, considering, or reconvening a mediation or retaining the mediator.

Based on discussions of this issue to date, the staff recommends this approach and seeks the Commission's approval.

CAJ'S CONCERNS

As reported at the Commission's meeting on April 10, 1997, the State Bar Committee on Administration of Justice ("CAJ") wrote a letter to Assembly Member Ortiz stating that CAJ would support AB 939 if amended. The staff responded to CAJ's letter, explaining that some of CAJ's suggestions had previously been considered but others might be acceptable if CAJ would support the Commission's bill. CAJ has not yet sent a reply. We understand, however, that CAJ probably will agree to support AB 939 if amended as outlined in the staff's letter.

Thus, the Commission should determine its position on the changes contemplated in that letter, which are:

(1) Amending proposed Evidence Code Section 1119 to read:

> 1119. An oral agreement is in accordance with Section 1119 if it satisfies all of the following conditions:
>
> (a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
>
> (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator and the parties express on the record that they agree to the terms recited.
>
> (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

The proposed additional language for subdivision (b) is implicit in the current version of Section 1119, but making it explicit may be helpful.

(2) Amending proposed Section 1121(b)(2) to provide that the chapter on mediation confidentiality does not limit the "effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action." As currently drafted, proposed Section 1121(b)(2) would continue existing Section 1152.5(e) without substantive change. CAJ's suggested expansion to encompass extensions of litigation deadlines seems reasonable.

(3) Revising the Comment to Section 1124 (written settlements and oral agreements reached through mediation) to explain that the provision does not affect the use of confidential settlement agreements. Rather, Section 1124 means that the chapter on mediation confidentiality does not prevent admissibility or disclosure of a settlement agreement under the circumstances specified in the provision. It does not mean that other rules, such as the hearsay rule or a confidentiality clause in a settlement agreement, cannot be invoked to bar admissibility or disclosure.

CDRC'S COMMENTS ON SECTIONS 1118 AND 1120

In its letter to Assembly Member Ortiz, CDRC expresses two important concerns:

• Concern relating to Section 1118 (mediation-arbitration) — in particular, concern that a mediator-arbitrator may find it difficult to ignore confidential mediation communications in a subsequent arbitration. (Exhibit p. 19.)

• Concern regarding the meaning of the word "confidential" in Section 1120(c), which continues existing Section 1152.5(a)(3). (Exhibit pp. 19-20.)

The Commission did not overlook these points in drafting its bill, but rather determined that reaching a consensus on the extent to which a mediator may serve as arbitrator, or the degree to which a mediation communication is confidential (as opposed to inadmissible or protected from discovery), is likely to prove challenging, if not impossible. Rather than jeopardizing or delaying its other proposed reforms (in particular, resolution of the conflict between Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), and Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996)), the Commission sought to avoid these issues in drafting its proposal.

The staff explained this history to Lauren Burton (Chair of CDRC's Mediation Committee), commenting that both of the topics raised may be suitable for future study and perhaps future legislation. Because of the complexity and difficulty of the issues involved, the staff continues to recommend against trying to resolve them in AB 939. Although CDRC has not formally responded to the staff's comments, we understand that CDRC is unlikely to press its points in the context of AB 939.

CONFORMING AB 1374 (HERTZBERG)

Assembly Member Hertzberg has introduced a bill (AB 1374) to establish a new pilot project involving court-ordered mediation of civil disputes in which the amount in controversy exceeds $50,000. As currently drafted, his bill refers to Section 1152.5 of the Evidence Code, which would be repealed by the Commission's bill. He is aware of this situation and has promised to amend his bill to account for the Commission's bill. No Commission action is necessary on this point.

PROPOSED SECTION 1125 (WHEN MEDIATION ENDS)

Proposed Section 1125 (when mediation ends) has raised a number of concerns, including one critical issue and a number of more minor problems. This discussion traces the history of that provision, analyzes the suggestions received, and proposes some amendments.

Original objective

From its inception, a major objective of the Commission's study on mediation confidentiality has been to resolve a conflict between two appellate decisions on whether mediation confidentiality applies to the process of converting an oral compromise reached in mediation to a definitive written agreement. *Compare* Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 protects oral statement of settlement terms) *with* Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (Section 1152.5 does not protect oral statement of settlement terms). As explained in the Commission's recommendation, resolution of this uncertainty is critical: "If confidentiality applies, then parties cannot enforce the oral compromise, because evidence of it is inadmissible. If confidentiality does not apply, the oral compromise may be enforceable even if it is never reduced to writing." *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407, 422 (1996).

Original approach

In the revised staff draft recommendation attached to Memorandum 97-3, the Commission addressed this issue through the following provision on oral agreements reached in mediation:

1129. (a) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if it is recorded in accordance with Section 1121.1.

(b) On recording, in accordance with Section 1121.1, an oral agreement compromising, settling, or resolving a dispute in whole or in part, the mediation ends for purposes of this chapter.

Comment. By following the procedure in Section 1121.1, mediation participants may create an oral settlement agreement that can be enforced without violating Section 1122 (mediation confidentiality). The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement.

Unless the mediation participants follow the specified procedure, confidentiality extends through the process of converting an oral compromise to a definitive written agreement. Section 1129 thus codifies the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and rejects the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

See Section 1120 (definitions). See also Section 1128 (written settlements reached through mediation).

In short, under this provision an oral compromise reached in mediation would be admissible and subject to disclosure only if it were recorded in accordance with the specified statutory procedure, in which case the mediation would end upon completion of the procedure and subsequent communications would not be confidential. Otherwise, the process of converting an oral compromise to a written agreement would be confidential. Prior drafts of the Commission's recommendation were similar.

Revised approach

At its meeting on January 24, 1997, the Commission approved the revised staff draft recommendation, but directed the staff to make certain revisions, including addition of a provision on when mediation ends:

> Sections 1128 and 1129 should be reorganized into (1) a statute on written settlements and oral agreements reached through mediation, and (2) a statute on when mediation ends for purposes

of the chapter on mediation. The latter statute should provide that mediation ends when:

• A written settlement fully resolving a dispute is fully executed.

• The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1121.1.

• The mediator or a disputant submits a declaration stating that the mediation is over.

The statute should also provide that if mediation partially resolves a dispute, mediation as to the issues resolved ends when:

• A written settlement partially resolving a dispute is fully executed.

• Mediation participants partially resolve a dispute by an oral agreement in accordance with Section 1121.1.

[Minutes, 1/24/97, at pp. 7-8.]

The staff implemented these instructions by revising the provisions in question to read:

§ 1124. Written settlements and oral agreements reached through mediation

1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:

(1) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(2) The agreement provides that it is enforceable or binding or words to that effect.

(3) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.

(4) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.

§ 1125. When mediation ends

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

(1) A written settlement fully resolving the mediated dispute is fully executed.

(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.

(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.

(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.

(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:

(1) A written settlement partially resolving the dispute is fully executed.

(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.

Revised objective

As reworked, the provision on when mediation ends goes beyond resolving the conflict between *Regents of University of California v. Sumner* and *Ryan v. Garcia.* It not only specifies when mediation ends if an oral compromise is reached, but also specifies when mediation confidentiality ends in other situations. The intent, and reason for switching to this new approach, was to help mediation participants determine which communications would be considered confidential and which would not.

Minor problems

Minor concerns relating to proposed Section 1125 include:

(1) CAOC observes that if none of the four events described in subdivision (a) occurs, a mediation could go on indefinitely. (Exhibit p. 18.) That problem could be addressed by adding subdivision (a)(5), stating:

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

….

(5) For ten court days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties to the mediation may shorten or extend this time by agreement.

(2) CDRC suggests that the term "declaration" in Section 1125(a)(3) and (a)(4) "is too formal and lends itself to a judicial or administrative proceeding." (Exhibit p. 20.) The staff agrees and proposes to substitute "writing signed by the mediator" in subdivision (a)(3) and "writing signed by the disputant" in subdivision (a)(4).

(3) CDRC also points out that mediators may not like saying "further mediation would not be worthwhile," as required in Section 1125(a)(3). CDRC would replace that phrase with "the mediation is terminated, or words to that effect," which seems a reasonable solution. (Exhibit p. 20.)

(4) Ron Kelly has pointed out orally that Section 1125(a)(4) could be interpreted to allow one party to unilaterally terminate a multi-party mediation. That defect could be remedied by adding a second sentence to Section 1125(a)(4):

> 1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:
>
> ….
>
> (4) A ~~disputant~~ party to the mediation provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect. If there are more than two parties to the mediation, the mediation ends only as to the party providing the declaration.

Key issue

The preceding flaws in Section 1125 are relatively easy to address, but the provision also presents a more serious problem, which has become apparent in considering the impact of Assembly Member Hertzberg's bill to establish a new pilot program. As presently drafted, that bill seems to give courts in the proposed pilot program authority to order disputants to participate in six hours of mediation (or at least to pay for their share of six hours of mediation). Section 1125(a)(4) could be construed to conflict with that aspect of AB 1374, or with any other provision requiring parties to mediate for a certain length of time, to mediate in good faith, or the like. Arguably, Section 1125(a)(4) would authorize a disputant to terminate a mediation, or at least to withdraw from a mediation, at any time. If Section 1125(a)(4) were construed in that manner, then the Commission's bill would be taking sides on a very controversial issue: Whether, and to what extent, a party can be compelled to mediate.

That was not the Commission's intent in proposing Section 1125. Rather, the objective was to help mediation participants differentiate between confidential mediation communications and unprotected post-mediation discussions. If Section 1125 were interpreted more narrowly, however, it would still present problems. For example, suppose the provision were construed to mean that confidentiality stops when a party provides the required declaration (or writing signed by the party), but the mediation may continue pursuant to a requirement

such as the six hour mandate in AB 1374. Because Section 1125 expressly applies "[f]or purposes of this chapter" on mediation confidentiality, that construction is entirely possible, but it would present the anomaly of a mediation without mediation confidentiality, which again is inconsistent with the Commission's intent.

Is there a way out of this dilemma? The staff has two suggestions, neither of which is wholly satisfactory.

Option #1

A first possibility is to go back to the Commission's original approach, resolving the conflict between *Regents of University of California v. Sumner* and *Ryan v. Garcia,* but not providing any further guidance on when mediation ends. That could be accomplished by replacing the current version of Sections 1124 and 1125 with the following:

> **§ 1124. Written settlements ~~and oral agreements~~ reached through mediation**
>
> 1124. ~~(a)~~ Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:
>
> ~~(1)~~ (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
>
> ~~(2)~~ (b) The agreement provides that it is enforceable or binding or words to that effect.
>
> ~~(3)~~ (c) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.
>
> ~~(4)~~ (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.
>
> ~~(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.~~
>
> **§ 1125. ~~When mediation ends~~ Oral agreements reached through mediation**
>
> 1125. (a) ~~For purposes of this chapter, a mediation ends when any of the following conditions is satisfied~~:
>
> ~~(1) A written settlement fully resolving the mediated dispute is fully executed.~~
>
> ~~(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.~~
>
> ~~(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.~~

~~(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.~~

~~(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:~~

~~(1) A written settlement partially resolving the dispute is fully executed.~~

~~(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.~~ Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.

(b) When an oral agreement fully resolving a dispute is reached in accordance with Section 1119, the mediation ends for purposes of this chapter.

(c) When an oral agreement partially resolving a dispute is reached in accordance with Section 1119, the mediation ends as to the issues resolved.

This approach avoids the issue of mandatory mediation, which may jeopardize the Commission's bill and its needed reforms. On the downside, however, it would provide only limited guidance on when mediation confidentiality ends.

Option #2

A second possibility would be to amend Section 1125 to: (1) correct the minor flaws as previously discussed, (2) preclude the erroneous interpretation that Section 1125(a)(4) authorizes a disputant to terminate or withdraw from a mediation at any time, and (3) prevent the anomalous result of a mediation without mediation confidentiality. The staff tentatively suggests revising Section 1125 as follows:

§ 1125. When mediation ends

1125. (a) ~~For purposes of this chapter, a~~ A mediation ends when any of the following conditions is satisfied:

(1) A written settlement fully resolving the mediated dispute is fully executed.

(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.

(3) The mediator provides the mediation participants with a ~~declaration stating that further mediation would not be worthwhile~~ writing signed by the mediator stating that the mediation is terminated, or words to that effect.

(4) A ~~disputant~~ party to the mediation provides the mediator and the other mediation participants with a ~~declaration~~ writing signed by the party stating that the mediation is terminated, or words to that effect. If there are more than two parties to the mediation, the mediation ends only as to the party providing the declaration.

(5) For ten court days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) ~~For purposes of this chapter, if~~ If a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:

(1) A written settlement partially resolving the dispute is fully executed.

(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.

(c) Nothing in this section authorizes termination of a mediation if termination would violate a statute or written agreement.

Under this approach, if one of the specified events occurred, the mediation would clearly end for all purposes, not just for purposes of mediation confidentiality, so the problem of a mediation without confidentiality would disappear. A party to the mediation would be *able* to end the mediation at any time, but subdivision (c) makes clear that just because a party is *able* to end a mediation does not necessarily mean the party is *free to end the mediation without impunity*. By making this amendment, and simultaneously revising Section 1115 to clarify that AB 939 neither expands a court's authority to order participation in a mediation nor authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation, the Commission may be able to steer clear of the thorny issue of mandatory mediation.

Recommendation

The staff is convinced that Section 1125 must be amended to prevent unintended and troublesome interpretations. Of the two options presented, the first seems most likely to facilitate passage of AB 939. Option #2 would provide greater guidance on when mediation ends, but it may encounter opposition relating to mandatory mediation, despite the staff's efforts to avoid that issue. On balance, the staff is inclined to implement Option #1 and consider the possibility of a future study on when mediation ends. Of course, the Commission or

someone else may be able to suggest a better approach. The staff encourages the Commission and interested persons to think about alternative solutions.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

AMENDED IN ASSEMBLY APRIL 9, 1997

CALIFORNIA LEGISLATURE—1997–98 REGULAR SESSION

ASSEMBLY BILL No. 939

Introduced by Assembly Member Ortiz
(Principal coauthor: Assembly Member Ackerman)

February 27, 1997

An act to amend Section 467.5 of the Business and Professions Code, to amend Section 1775.10 of the Code of Civil Procedure, to amend Section 703.5 of, to amend and renumber the heading of Chapter 2 (commencing with Section 1150) of Division 9 of, to add Chapter 2 (commencing with Section 1115) to Division 9 of, and to repeal Sections 1152.5 and 1152.6 of, the Evidence Code, to amend Sections 66032 and 66033 of the Government Code, to amend Sections 10089.80 and 10089.82 of the Insurance Code, to amend Section 65 of the Labor Code, and to amend Section 350 of the Welfare and Institutions Code, relating to mediation.

LEGISLATIVE COUNSEL'S DIGEST

AB 939, as amended, Ortiz. Mediation.

(1) Under existing law, when a person consults a mediator or mediation service for the purpose of retaining mediation services, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or

mediators are confidential, except as specified. If the testimony of a mediator is sought to be compelled in any civil action or proceeding regarding anything said in the course of a mediation, the court is required to award reasonable attorney's fees and costs to the mediator against the person seeking the testimony. Existing law provides that a mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, except as specified.

This bill would, among other things, revise and recast these provisions, as specified, to apply to a mediation ordered by a court or other adjudicative body, and to a mediation consultation, would define the terms "mediation," "mediator," and "mediation consultation" for this purpose and make corresponding changes.

(2) Existing law provides that if an insured party and an insurer reach an agreement proposed during mediation, the insured will have 3 business days to rescind the agreement.

This bill would provide that if such rescission occurs, the agreement may not be admitted in evidence or disclosed unless all the parties to the agreement agree to its disclosure.

(3) Existing law provides that records of the Department of Industrial Relations relating to labor disputes are confidential, except that any decision or award *arising out of* arbitration proceedings shall be a public record.

This bill would apply the provisions of this bill described in (1) above to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. It would provide that all other records relating to labor disputes are confidential, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 467.5 of the Business and Professions Code is amended to read:

467.5. Notwithstanding the express application of Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code to mediations, all proceedings

conducted by a program funded pursuant to this chapter, including, but not limited to, arbitrations and conciliations, are subject to Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code.

SEC. 2. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation shall be subject to Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115) of Division 9, of the Evidence Code.

SEC. 3. Section 703.5 of the Evidence Code is amended to read:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent arbitration, administrative adjudication, civil action, or other noncriminal proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

SEC. 4. Chapter 2 (commencing with Section 1115) is added to Division 9 of the Evidence Code, to read:

CHAPTER 2. MEDIATION

1115. For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.

~~1116. (a) This chapter does not apply to a proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or a proceeding under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.~~

~~(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.~~

~~1117. (a) This chapter does not apply to a settlement conference pursuant to Rule 222 of the California Rules of Court.~~

~~(b) This chapter applies to a mediation that is ordered by a court or other adjudicative body, unless the proceeding is excepted by subdivision (a) of Section 1116.~~

1116. (a) Except as provided in subdivision (b), this chapter applies to any mediation, regardless of whether participation in the mediation is voluntary, pursuant to an agreement, pursuant to order of a court or other adjudicative body, or otherwise.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 222 of the California Rules of Court.

(c) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

1118. (a) This chapter does not prohibit either of the following:

(1) A premediation agreement that, if mediation does not fully resolve the dispute, the mediator will then act as arbitrator or otherwise render a decision in the dispute.

(2) A postmediation agreement that the mediator will arbitrate or otherwise decide issues not resolved in the mediation.

(b) If a dispute is governed by an agreement described in subdivision (a), in arbitrating or otherwise deciding all or part of the dispute, the person who served as mediator may not consider any information from the mediation that is inadmissible or protected from disclosure under this chapter, unless all of the parties to the mediation expressly agree in writing, or orally in accordance with Section 1119, before or after the mediation that the person may use specific information from the mediation.

1119. An oral agreement is in accordance with Section 1119 if it satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.

(b) The terms of the oral agreement are recited on the record.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

1120. (a) Except as otherwise expressly provided by statute, no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible in evidence or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) Except as otherwise expressly provided by statute, no document, or writing as defined in Section 250, or copy of a document or writing, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a

mediation consultation, is admissible in evidence or subject to discovery, and disclosure of the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

1121. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

1122. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1119.

1123. (a) Notwithstanding any other provision of this chapter, a communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, may be admitted in evidence

or disclosed if either of the following conditions is satisfied:

(l) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1119, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1119, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:

(1) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(2) The agreement provides that it is enforceable or binding or words to that effect.

(3) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.

(4) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

(1) A written settlement fully resolving the mediated dispute is fully executed.

(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.

(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.

(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.

(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:

(1) A written settlement partially resolving the dispute is fully executed.

(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.

1126. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body determines that the testimony or document is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or document.

1127. Any reference to a mediation, or a declaration under Section 1125, during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation, or a declaration under Section 1125, during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

SEC. 5. The heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code is amended and renumbered to read:

CHAPTER 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

SEC. 6. Section 1152.5 of the Evidence Code is repealed.

SEC. 7. Section 1152.6 of the Evidence Code is repealed.

SEC. 8. Section 66032 of the Government Code is amended to read:

66032. (a) Notwithstanding any provision of law to the contrary, all time limits with respect to an action shall be tolled while the mediator conducts the mediation, pursuant to this chapter.

(b) Mediations conducted by a mediator pursuant to this chapter that involve less than a quorum of a legislative body or a state body shall not be considered meetings of a legislative body pursuant to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), nor shall they be considered meetings of a state body pursuant to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2).

(c) Any action taken regarding mediation conducted pursuant to this chapter shall be taken in accordance with the provisions of current law.

(d) Ninety days after the commencement of the mediation, and every 90 days thereafter, the action shall be reactivated unless the parties to the action do either of the following:

(1) Arrive at a settlement and implement it in accordance with the provisions of current law.

(2) Agree by written stipulation to extend the mediation for ~~an~~ another 90-day period.

(e) Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to any mediation conducted pursuant to this chapter.

SEC. 9. Section 66033 of the Government Code is amended to read:

66033. (a) At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance, consistent with Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, containing each of the following:

(1) The title of the action.

(2) The names of the parties to the action.

(3) An estimate of the costs avoided, if any, because the parties used mediation instead of litigation to resolve their dispute.

(b) The sole purpose of the report required by this section is the collection of information needed by the office to prepare its report to the Legislature pursuant to Section 66036.

SEC. 10. Section 10089.80 of the Insurance Code is amended to read:

10089.80. (a) The representatives of the insurer shall know the facts of the case and be familiar with the allegations of the complainant. The insurer or the insurer's representative shall produce at the settlement conference a copy of the policy and all documents from the claims file relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The insured shall produce, to the extent available, all documents relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The mediator may also order production of other documents that the mediator determines to be relevant to the issues under mediation. If a party declines to comply with that order, the mediator may appeal to the commissioner for a determination of whether the documents requested should be produced. The commissioner shall make a determination within 21 days. However, the party ordered to produce the documents shall not be required to produce while the issue is before

the commissioner in this 21-day period. If the ruling is in favor of production, any insurer that is subject to an order to participate in mediation issued under subdivision (a) of Section 10089.75 shall comply with the order to produce. Insureds, and those insurers that are not subject to an order to participate in mediation, shall produce the documents or decline to participate further in the mediation after a ruling by the commissioner requiring the production of those other documents. Declination of mediation by the insurer under this section may be considered by the commissioner in exercising authority under subdivision (a) of Section 10089.75.

The mediator shall have the authority to protect from disclosure information that the mediator determines to be privileged, including, but not limited to, information protected by the attorney-client or work-product privileges, or to be otherwise confidential.

(b) The mediator shall determine prior to the mediation conference whether the insured will be represented by counsel at the mediation. The mediator shall inform the insurer whether the insured will be represented by counsel at the mediation conference. If the insured is represented by counsel at the mediation conference, the insurer's counsel may be present. If the insured is not represented by counsel at the mediation conference, then no counsel may be present.

(c) Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted under this chapter.

(d) The statements made by the parties, negotiations between the parties, and documents produced at the mediation are confidential. However, this confidentiality shall not restrict the access of the department to documents or other information the department seeks in order to evaluate the mediation program or to comply with reporting requirements. This subdivision does not affect the discoverability or admissibility of documents that are otherwise discoverable or admissible.

SEC. 11. Section 10089.82 of the Insurance Code is amended to read:

10089.82. (a) An insured may not be required to use the department's mediation process. An insurer may not be required to use the department's mediation process, except as provided in Section 10089.75.

(b) Neither the insurer nor the insured is required to accept an agreement proposed during the mediation.

(c) If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. Notwithstanding Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, if the insured rescinds the agreement, it may not be admitted in evidence or disclosed unless the insured and all other parties to the agreement expressly agree to its disclosure. If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded.

(d) This section does not affect rights under existing law for claims for damage that were undetected at the time of the settlement conference.

(e) All settlements reached as a result of department-referred mediation shall address only those issues raised for the purpose of resolution. Settlements and any accompanying releases are not effective to settle or resolve any claim not addressed by the mediator for the purpose of resolution, nor any claim that the insured may have related to the insurer's conduct in handling the claim.

Referral to mediation or the pendency of a mediation under this article is not a basis to prevent or stay the filing of civil litigation arising in whole or in part out of the same facts. Any applicable statute of limitations is tolled for the number of days beginning from the referral to mediation until the date on which the mediation is either completed or declined, or the date on which the insured fails to

appear for a scheduled mediation for the second time, or, in the event that a settlement is completed, the expiration of any applicable three business day cooling off period.

~~SEC. 12. Section 65 of the Labor Code is amended to read:~~

~~65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records of the department relating to labor disputes are confidential.~~

SEC. 12. Section 65 of the Labor Code is amended to read:

65. The department may investigate and mediate labor disputes providing any bona fide party to ~~such~~ *this type of* dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to ~~such~~ *the* dispute may agree upon. ~~Records~~ *Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division*

9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records of the department relating to labor disputes are confidential~~; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record~~.

SEC. 13. Section 350 of the Welfare and Institutions Code is amended to read:

350. (a) (1) The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his or her welfare with any provisions that the court may make for the disposition and care of the minor.

(2) Each juvenile court is encouraged to develop a dependency mediation program to provide a problem-solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary. Notwithstanding any other provision of law, no person, except the mediator, who is required to report suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code), shall be exempted from those requirements under Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code because he or she agreed to participate in a dependency mediation program established in the juvenile court.

If a dependency mediation program has been established in a juvenile court, and if mediation is requested by any person who the judge or referee deems to have a direct and legitimate interest in the particular case, or on the court's own motion, the matter may be set for confidential mediation to develop a plan in the best interests of the child, utilizing resources within the family first and within the community if required.

(b) The testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents, if the minor's parent or parents are represented by counsel, the counsel is present and any of the following circumstances exist:

(1) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(2) The minor is likely to be intimidated by a formal courtroom setting.

(3) The minor is afraid to testify in front of his or her parent or parents.

After testimony in chambers, the parent or parents of the minor may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

The testimony of a minor also may be taken in chambers and outside the presence of the guardian or guardians of a minor under the circumstances specified in this subdivision.

(c) At any hearing in which the probation department bears the burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met. That action includes, but is not limited to, the dismissal of the petition and release of the minor at a jurisdictional hearing, the return of the minor at an out-of-home review held prior to the permanency planning hearing, or the termination of jurisdiction at an in-home review. If the motion is not

granted, the parent or guardian may offer evidence without first having reserved that right.

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CONSUMER ATTORNEYS OF CALIFORNIA

David S. Casey, Jr. President | Rick Simons President-Elect | Donald C. Green Chief Legislative Advocate | Nancy Drabble Senior Legislative Counsel | Nancy Peverini Legislative Counsel | Lea-Ann Tratten Legal Counsel

April 14, 1997

Assembly Member Deborah Ortiz
State Capitol, Room 2148
Sacramento, CA 95814

RE: AB 939 (ORTIZ) REQUEST FOR AMENDMENTS

Dear Assembly Member Ortiz:

The Consumer Attorneys of California has reviewed AB 939, which is scheduled to be heard before the Assembly Judiciary Committee on April 16, 1997.

AB 939 attempts to rewrite, consolidate and expand existing statutes on mediation and arbitration, particularly confidentiality issues. While we do not disagree with the basic premise of the bill (these procedures should be confidential), we have the following comments:

First, CAOC must oppose the current definition of "mediation" in added Evidence Code Section 1115 (page 3, lines 36-40). AB 939 defines mediation as "a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part."

There is one absolutely crucial item missing from this general definition: except for statutorily authorized court ordered mediations (such as the current Los Angeles pilot project created by Senator Lockyer's SB 401 or the proposed pilot in Assembly Member Hertzberg's AB 1374), voluntary participation is essential to mediation. We and others believe that mediation, by its very nature, depends upon the voluntary submission of disputes to a neutral facilitator.

Mediation usually involves a neutral person who facilitates disputes between willing parties and primarily relies on communication skills. The mediator cannot impose a settlement, absent agreement, and the parties can choose to continue litigation if they do not reach an agreement. Mediation can be helpful in situations where the parties want or need to maintain some type of relationship, for example, divorcing parents who have children or business colleagues who may want to conduct future business despite the present conflict.

Legislative Department

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CAOC has opposed past legislation which mandates mediation, and we are very concerned that AB 939's definition undermines the principle of voluntariness in mediation.

The following amendment removes our concern:

> "Mediation" means a statutorily authorized mediation process or the voluntary submission by parties to a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

We believe this definition allows the bill's protections to cover most mediations without changing the well-accepted definition and understanding of what constitutes mediation.

Second, we are working with the sponsors (the California Law Revision Commission) on issues surrounding the bill's definition of when a mediation ends (See page 7, line 37). Although we appreciate this section's purpose, there are situations outside the bill's definition of when the mediation ends--does that mean the mediation continues indefinitely? For example, two parties may spend a few hours at a mediation, reach no agreement, go home and continue to litigate the case. Under AB 939, the mediation only ends when (1) there is a written settlement, (2) there is a resolution, or (3) there is a declaration of some type. Technically, if none of those occurs, the mediation is continuing. We believe the sponsors are reviewing this issue and trying to resolve the problem.

Again, thanks for considering our views. There are significant issues within our organization and for consumers on alternative dispute resolution, and we appreciate your efforts. If you or a member of your staff would like to discuss this issue further, please contact me or one of our legislative representatives in Sacramento.

Sincerely,

David S. Casey, Jr.

David S. Casey, Jr.
President

cc: Assembly Judiciary Committee

California Dispute Resolution Council

promoting effective, accessible conflict resolution services statewide

April 11, 1997

Law Revision Commission
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APR 14 1997

File:_____

Hon. Deborah V. Ortiz
Assemblymember, Ninth District
California State Assembly
Capitol Building #2148
Sacramento, CA 95814

RE: AB 939 on Mediation Confidentiality- Support with Amendments

Dear Assemblymember Ortiz:

I am writing to you on behalf of the California Dispute Resolution Council (CDRC), whose membership of more than 400 includes leaders from all the major dispute resolution organizations in California, all sectors of practice and all types of organizational affiliations. Among CDRC's individual members are prominent practitioners (both paid and volunteer service providers), directors and staff from a wide variety of practice organizations (both for-profit and non-profit), retired judges, trainers and leading academicians.

CDRC supports AB 939, with some suggested amendments. Last week, CDRC held three Statewide Dialogues with over 160 people attending. There was a strong consensus of support for AB 939, in principle, as it strengthens and clarifies the protections for mediation confidentiality. The Law Revision Commission, sponsor of AB 939, is to be commended for a fine job on drafting this comprehensive piece of legislation. CDRC has reviewed and worked closely with the Commission on the development of this important legislation over the past year and has approved of the Commission's intent to clarify and extend existing protections.

Based on the Statewide Dialogues and the review of the CDRC Mediation Legislation Committee, the CDRC Board of Directors is currently considering some suggested amendments to the following sections of AB 939:

Section 1118. There has been some expressed concern about this section as the only section of the bill which is not explicitly about mediation and some concerns that a mediator who received confidential information in a caucus meeting, would have an difficult challenge in later issuing a binding arbitration award which would not consider such information.

Section 1120 (c) CDRC is concerned about what the bill intends with the word, "confidential", which has not been previously defined in the statute. CDRC believes that the participants in the mediation should decide whether or not they will be able to discuss what took place in the mediation with others outside of the mediation

process. One example might be to determine whether to discuss with a spouse or life partner; another could be to discuss with other neighbors who may have a

community interest in the outcome; or in a public policy context, the end of many mediations is a press conference or press release of the terms and conditions of the proposed agreement.

Section 1125 (a) (3) and (4) In both sections, we would like to suggest that the term "declaration" is too formal and lends itself to a judicial or administrative proceeding. In addition, CDRC believes that most mediators would not like to be quoted stating the words, "further mediation would not be worthwhile." We would suggest that this wording be replaced with, "a written statement that the mediation is terminated, or words to that effect." Finally, this section is not clear what the parties to the mediation which has been terminated need to do to reinitiate mediation if they think it would be helpful.

We thank you for the opportunity to comment and appreciate your leadership in carrying AB 939. We would be pleased to work with you, your staff and the Law Revision Commission on the suggested amendments above. In the event that you have questions or concerns about our comments, please direct them to Lauren Burton, Chair, CDRC Mediation Legislation Committee, P.O. Box 55020, Los Angeles, CA 90055, (213) 896-6535, fax (213) 627-1426 or e-mail: lburton@lacba.org or the CDRC Lobbyist, Donne Brownsey @ Government Solutions, 1005 12th Street, Suite 10, Sacramento, CA, 95814, (916) 448-2260, fax (916) 448-2554 or e-mail: brownsey@ix.netcom.com.

Sincerely,

Dennis Sharp

Dennis Sharp
President

cc: Barbara S. Gaal, Esq.
Lauren Burton
Ron Kelly
CDRC Executive Committee
CDRC Mediation Committee
Donne Brownsey, Esq.

SCMA
Southern California Mediation Association

April 15, 1997

Ms. Barbara Gaal, Staff Counsel
California Law Revision Commission
Fax 415/494-1827
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal:

The Southern California Mediation Association supports AB 939, with the following recommendations:

a. The following language be added to Section 1115 (c): "or reconvening a mediation."

b. Language should be added to section 1125 (a) (3) to ensure that communications between the mediator and the participants, subsequent to the mediator's declaration that the mediation has ended (or words to that effect), are confidential. SCMA recommends that 1125 (a) (3) provide:

"The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect. Provided that all subsequent communications between the mediator and the participants concerning the mediation are for reconvening purposes and are therefore confidential pursuant to Sections 1115 (c) and 1120 (c)."

This way the mediator is protected from being subpoenaed regarding conversations after the mediation has allegedly "ended."

Sincerely,

Mary Culbert

Mary B. Culbert
Chair, SCMA Public Policy Committee

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